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SUPREME COURT OF THE UNITED STATES
October Term 1984
NO. _____

COLLIN LEE QUICK and BARBARA GORDON,
PETITIONERS,

v.

STATE OF CALIFORNIA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeal of the
State of California
Second Appellate District
Division 2

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QUESTIONS PRESENTED

1. Whether a state criminal prosecution can be commenced and thereafter maintained unless the state complies with the mandatory "must" and "shall" language of the initiating state criminal statutes?

2. Whether the failure of the state of California to comply with its mandatory penal code provisions denies due process of law under the fourteenth amendment of the U.S. Constitution?

3. Whether the convictions of the petitioners must be reversed for failure to comply with the mandatory state criminal statutes?

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned attorney, a member of the Bar of the Supreme Court of The United States, certifies that the following listed parties have an interest in the outcome of this case. These representations are made to enable justices of the court to evaluate possible disqualifications or recusal.

There are no interested parties other than those named in the caption of this case and their attorneys of record.

_____

Roger S. Hanson
Attorney for Petitioners
Member of the Bar U.S. Supreme Court

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984
No._____

COLLIN LEE QUICK and BARBARA GORDON,
Petitioners,

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STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeal
State of California
Second Appellate District

To the Honorable WARREN E. BURGER, Chief Justice of the United States and to the Honorable Associate Justices of the UNITED STATES SUPREME COURT:

Petitioners COLLIN QUICK and BARBARA GORDON seek Certiorari to the Court of Appeal of the State of California, Second Appellate District.

The Second Appellate District affirmed their convictions on **January 23, 1985** and the Supreme Court of California denied a Hearing on April 3, 1985.

Dated this 25th day of May, 1985 at Santa Ana, California, 92701.

Respectfully submitted,

ROGER S. HANSON
Attorney for Petitioners
Member of the Bar, U.S. Supreme Court

OPINION BELOW

The Court of Appeal of the State of California for the Second Appellate District, Division 2, affirmed petitioners' conviction on **January 23, 1985.** A copy of that opinion appears as Appendix "A".

The California Supreme Court denied a Hearing to Petitioners. A copy of that Order appears as Appendix "B".

JURISDICTION

This Honorable Court has jurisdiction to review this case under 18 U.S.C. § 1257 within 60 days after the final action of the highest state court. The Supreme Court of California denied a Hearing on April 3, 1985.

U.S. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be

seized."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall... be deprived of life, liberty, or property without due process of law."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions the accused shall enjoy the right to . . . have the assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

California Constitution Article I, Section 14 provides in relevant part:

> "A person charged with a felony by complaint subscribed under **penalty of perjury** and on file in a Court in the county where the felony is triable shall be taken without unnecessary delay

before a magistrate of that Court." (emphasis supplied)

CALIFORNIA PENAL CODE SECTIONS HEREIN RELEVANT AND INVOLVED

California Penal Code §806:

"A proceeding for the examination before a magistrate of a person on a charge of an offense originally triable in a superior court must be commenced by written complaint under oath subscribed by the complainant and filed with the magistrate. Such complaint may be verified on information and belief. When the complaint is used as a pleading to which the defendant pleads guilty under §859a of this code, the complaint shall contain the same allegations, including the charge of prior conviction or convictions of crime, as are required for indictments and informations and,wherever applicable, shall be construed and shall have substantially the same effect as provided in this code for indictments and informations."

California Penal Code §859:

"When the defendant is charged with the commission of a public offense over which the superior court has original jurisdiction, by a written complaint subscribed under oath and on file in a

court within the county in which the public offense is triable, he or she shall, without unnessary delay, be taken before a magistrate of the court in which such complaint is on file. The magistrate shall immediately deliver to the defendant a copy of the complaint, inform the defendant that he or she has the right to have the assistance of counsel, ask the defendant if he or she desires the assistance of counsel, and allow the defendant reasonable time to send for counsel. However, in a capital case, the court shall inform the defendant that the defendant must be represented in court by counsel at all stages of the preliminary and trial proceedings and that such representation will be at the defendant's expense if the defendant is able to employ counsel or at public expense if he or she is unable to employ counsel, inquire of him or her whether he or she is able to employ counsel and, if so, whether the defendant desires to employ counsel of the defendant's choice or to have counsel assigned for him or her, and allow the defendant a reasonable time to send for his or her chosen or assigned counsel. The magistrate must, upon the request of the defendant, require a peace officer to take a message to any counsel whom the defendant may name, in the judicial district in which the court is situated. The officer shall, without delay and without a fee, perform that duty. If the defendant desires and is

unable to employ counsel, the court shall assign counsel to defend him or her; in a capiatl case, if the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to defend him or her. If it appears that the defendant may be a minor, the magistrate shall ascertain whether such is the case, and if the magistrate concludes that it is probable that the defendant is a minor, he or she shall immediately either notify the parent or guardian of the minor, by telephone or messenger, of the arrest, or appoint counsel to represent the minor. Upon the first court appearance of counsel, or upon a determination by a magistrate that the defendant can represent himself or herself, the prosecuting attorney shall, within two calendar days, deliver to, or make accessible for inspection and copying by, the defendant or counsel, copies of police, arrest and crime reports. Portions of such reports containing privileged information need not be disclosed if the defendant or counsel has been notified that privileged information has not been disclosed. If the charges against the defendant are dismissed prior to the time the above-mentioned documents are delivered or made accessible, the prosecuting attorney need not deliver or make accessible such

documents unless otherwise so compelled by law."

California Penal Code §738:

"Before an information is filed there must be a preliminary examination of the case against the defendant and an order holding him to answer made under §872. The proceeding for a preliminary examination must be commenced by a written complaint, as provided elsewhere in this code."

STATEMENT OF THE CASE

Petitioners GORDON and QUICK were charged with a California felony, forced to undergo a preliminary hearing, brought to trial and were convicted of a felony in California without the initial complaint being properly sworn to and executed as provided by a host of California Penal Code Statutes.

In California, jurisdiction cannot be conferred on the court absent a properly sworn and executed complaint, and the language of the relevant Penal Code Sections and State Constitution area is in the mandatory "must" and "shall" language.

Defense counsel raised the challenge to jurisdiction at each and every stage of the California proceeding: at arraignment; before commencement of the preliminary hearing; at arraignment and pre-trial motions in Superior Court; in petitions for mandamus/prohibition in the Court

of Appeal of the State of California for the Second Appellate District; and again on appeal to that Court following conviction.

The California Supreme Court dismissed a Petition for Hearing without explication.

A more detailed chronology with reference to the Clerk's or Reporter's Transcript on Appeal with page citations follows. Petitioners will, of course, provide that complete record in the appendix when Certiorari is granted.

DETAILED STATEMENT OF FACTS REFERENCED TO CLERK'S TRANSCRIPT ON APPEAL - C.T.A.

The preliminary hearing was held in the Los Cerritos Judicial District beginning December 14, 1981 before Honorable JOSEPH FARINA, Judge.

The charges were Conspiracy, P.C. 182, and H. & S. Code Violations 11351 & 11352. (P.H.T. 1 - C.T.A. 1).

An initial motion was made to dismiss the case because the complaint was not properly executed by the complainant, Howard W. Rhoads, Jr. The only other signature appearing on the document was that of Michael Laster, a Deputy Attorney General, who was not shown to either be capable of administering an oath, or that he in fact administered an oath to Howard W. Rhoads, Jr. (C.T.A. 3,4)

Jurisdiction can be raised at any time, and absent a properly sworn complaint, the Court simply had no jurisdiction. (R.T.A. 5,6), under Penal Code 806, cited on page 16, defense motion (See C.T.A. 426-427, p. 3 of P.C.

995 motion). See also Penal Code 859.

Counsel pointed out that the defective complaint was filed on July 28, 1981 and "supporting documents" alleged by the Attorney General to "cure the defect" were not prepared until July 29, 1981, i.e., a day later. (C.T.A. 7,8)

Counsel pointed out that the complaint was not signed under penalty of perjury, but was purported to be in the way of an affidavit, requiring the **swearing under oath**; the latter manifestly did not occur. (C.T.A. 8).

Counsel pointed out that a Deputy Attorney General was not such a neutral and detached person able to administer the oath, analogizing to **Coolidge v. New Hampshire**, 91 S.Ct. 2022, 403 U.S. 443; at this time the Deputy Attorney General admitted that the listed Attorney General, one Michael Lasater, was not the person to whom the oath was "prescribed." (C.T.A. 8, lines 21-24).

A **correct complaint** was presented for the magistrates comparison. (C.T.A. 9-10).

In spite of the clear defects, and in spite of it being clearly pointed out, the magistrate denied the motion to dismiss. (C.T.A. 9, line 20 C.T.A. 10, lines 14-15).

REPORTER'S TRANSCRIPT ON APPEAL EVIDENCE REGARDING DEFECTIVE COMPLAINT[1]

John Gomez testified that he is the Clerk and Administrative Officer at the Los Cerritos Municipal Court, where his duties include being the custodian of records and exhibits as well as providing staff for the Municipal Court Judges. [20] Gomez has worked in that office for 23 years and is familiar with the procedures used in filing felony complaints as of July, 1981. [21] At that time, it was **not** the practice of his court to administer an oath to any person who brought in a felony complaint for filing.

Gomez was shown the Superior Court file containing the complaint in Municipal Court. [21] Despite the fact that there is a stamp on that complaint indicating that the complaint was sworn, in fact it was not sworn. [21-22] The procedure used at that time was that his staff was instructed to file the complaint because there was an understanding that any swearing of the complaint would be done by the District Attorney's Office.[2]

Gomez testified that no clerk administered any oath for the complaint in the instant case. [23]

1. Although counsel for Appellant QUICK and Appellant GORDON have moved to consolidate these appeals, there are two separate Reporter's Transcripts on Appeal. References here are to the one for Appellant COLLIN LEE QUICK.

2. The Attorney General agreed that there was no oath administered by any prosecutorial office.

Following lengthy legal argument [35-76] the court made a finding that the complaint was not sworn as required by Penal Code §806. [76] The court denied the defendants' nonstatutory motion to dismiss as well as their motion pursuant to Penal Code §995. [77]

ARGUMENT

I

A DEFENDANT IS NOT LEGALLY COMMITTED WITHIN THE MEANING OF PENAL CODE §995 WHEN THE COMPLAINT IN THE MUNICIPAL COURT IS NOT UNDER OATH AS REQUIRED BY PENAL CODE §806.

Penal Code §806 provides in part as follows:

> "A proceeding for the examination before a magistrate of a person on a charge of an offense originally triable in a Superior Court **must** be commenced by written complaint **under oath** subscribed by the complainant and filed with the magistrate." (emphasis added)

The requirement of a complaint under oath is again repeated in Penal Code §859, which provides in part as follows:

> "When the defendant is charged with the commission of a public offense over which the Superior Court has original jurisdiction, by a written complaint subscribed **under oath** and on a file in a Court within the county in which the public

offense is triable, he or she shall, without unnecessary delay, be taken before a magistrate of the Court, in which such complaint is on file." (emphasis added)

The section goes on to set forth the procedure to be followed at this initial appearance. § 850 of the Penal Code is part of Chapter 7 of the Penal Code, which chapter is entitled "EXAMINATION OF THE CASE AND DISCHARGE OF THE DEFENDANT, OR HOLDING HIM TO ANSWER." The entire section deals with the procedures to be used by the magistrate in dealing with cases originally triable in the Superior Court from arraignment through bind over.

In addition to the above statutory provisions, there is a constitutional provision which likewise requires a complaint to be under oath. Article I, Section 14 of the California Constitution provides in part as follows:

"A person charged with a felony by complaint subscribed under **penalty of perjury** and on file in a Court in the county where the felony is triable shall be taken without unnecessary delay before a magistrate of that Court."(emphasis supplied)

The above statutory and constitutional provisions are clear expressions that the complaint shall be "under oath" or under penalty of perjury. We suggest that the obvious intention of this language is to forbid any citizen from having to face felony charges unless the complainant is willing to and does swear to the allegations under penalty

of perjury. Such a requirement clearly prevents the possibility that law enforcement agents might harass a citizen by forcing him to face untrue allegations, because it makes a false allegation subject to the serious penalty of perjury.

In **People v. Salazar**, 266 C.A. 2d 113 (1968) the complainant did not sign the complaint under oath, but did place the following language above his signature: "I declare under penalty of perjury that the foregoing is true and correct." The court held that since the passage of Code of Civil Procedure § 2015.5, a statement under penalty of perjury is an adequate substitute for an oath.

> "It is not necessary that a complaint be sworn to before a magistrate; verification before a person authorized to administer an oath is sufficient. (Citations omitted)
>
> The question now presented for determination is whether the showing of probable cause may be made by means of an unsworn statement in the form for which provision is made in § 2015.5 of the Code of Civil Procedure. For reasons which we will state we hold that the required showing may validly be so made." [266 C.A. 2d at 114]

In commenting on the importance of either an oath or a declaration under penalty of perjury, the court stated the following:

> "A declaration made in accordance with § 2015.5 of the Code of Civil Procedure serves the same function as a sworn statement in that each acts as

a vehicle to convey to the magistrate the facts upon which reliance is placed as constituting a showing of probable cause. (See **People v. Sesslin**, 68 C. 2d 418, 422-426 [67 Cal.Rptr. 409, 438 P. 2d 321]) And each assures that the person stating the facts **does so with an awareness of the grave responsibility he has assumed with respect to the truthfulness of his statement.**" [266 C.A. 2d at 114-115] (emphasis supplied)

The above clearly establishes the statutory and constitutional requirements that a complaint charging an offense originally triable in the Superior Court **must** be under oath. We proceed to now demonstrate why the commitment is illegal when that requirement is violated.

Penal Code §738 provides as follows:

"Before an Information is filed, there **must** be a preliminary examination of the case against the defendant and an order holding him to answer made under §872. The proceedings for a preliminary examination **must be commenced by written complaint as provided elsewhere in this code.** [emphasis added]

Penal Code §738 is a clear mandate of what is required in order for there to have been a legal commitment, which in turn permits the filing of an Information. The section provides that the preliminary examination must be commenced by a written complaint as provided elsewhere in

the code. Penal Code §806 does in fact appear "elsewhere" in the code and is in fact cross-referenced to §738. As previously stated §806 mandates a complaint under oath. From all of this, it is clear that a combined reading of Penal Code § §738 and 806 results in a requirement from the legislature that the legality of the commitment depends upon the filing of a complaint "under oath".

In **People v. Hellium**, 205 C.A. 2d 150 (1962) counsel for the accused objected to evidence on Fourth Amendment grounds at the preliminary hearing. Because the issues were novel, the magistrate continued the hearing so that each side could present points and authorities. When the case was called at a later date counsel for the accused was not present, yet the court discussed the issues with the District Attorney, ruled against the defendant on the objections and held the defendant to answer. In Superior Court, the defendant attacked the legality of the commitment pursuant to Penal Code §995, and that motion was denied. The defendants thereafter appealed their conviction on that ground.

The Court of Appeal held that a commitment is illegal within the meaning of §995 when the defendant has been denied a "substantial right" at the preliminary hearing; the substantial right to counsel.

In addition to the above, there are numerous cases which have held a commitment illegal within the meaning of §995 whenever the committing magistrate has improperly denied a motion to suppress or keep out evidence based upon the defendant's Fourth Amendment rights.

That right too is clearly a "substantial right."

The "substantial right" of the petitioners in the instant case is the right to have a complaint under oath as required by statutory and constitutional provisions. That right has been violated. That right is based upon the Fourth, (by analogy) Fifth and Fourteenth Amendments to the United States Constitution. Clearly it is a "substantial right" within the meaning of the above cited cases.

II

A SUPERIOR COURT IS WITHOUT JURISDICTION TO PROCEED ON AN INFORMATION WHICH IS BASED UPON A COMMITMENT BY A MAGISTRATE WHO WAS WITHOUT JURISDICTION, BECAUSE THE COMPLAINT WAS NOT UNDER OATH AS REQUIRED BY PENAL CODE §806.

We incorporate by reference our previous discussion of the requirements that a complaint must be under oath in order to comply with the Penal Code and with the California Constitution. Without the required complaint under oath a magistrate is simply without jurisdiction to proceed, because the language of Penal Code §806 is mandatory. In **Burris v. Superior Court**, 43 C.A. 3d 530 (1974) the court stated as follows:

> "The authority of a magistrate is purely statutory. (Penal Code, §§806, 807) **People v. Cohen**, 118 Cal. 74, 78 [50 P. 20]. He is not a judge.' . . . [A] judge who sits as a magistrate does not carry

his Court or his judicial attributes with him except to the extent that they inhere in the office of magistrate'." [43 C.A. 3d at 537]

Likewise, in **People v. Case**, 105 C.A. 3d 826 (1980) the court states that the complaint is the "basis" for conducting the preliminary examination. [105 C.A. 3d at 834]

We digress at this point to thoroughly discuss **People v. Case**, because the order from the Court of Appeal cited that case as an apparent basis for its denial of the petition for Writ of Prohibition.

In **Case** the defendant sought to suppress a confession which he made following his arrest on a warrant, by urging that the warrant was invalid. At the bottom of both the affidavit and the warrant were the following words: "The complaint underlying this warrant of arrest does not initiate a criminal proceeding."

The defendant argued that a magistrate had no jurisdiction to issue a warrant unless a criminal proceeding has either been initiated or is at least contemplated. The Court of Appeals pointed out the obvious fact that the basis for a magistrate's jurisdiction to issue a warrant is the Fourth Amendment to the United States Constitution and Article I, §13, of the California Constitution which provide that a warrant may not issue except on probable cause shown by affidavit. Once probable cause is established by the affidavit, a warrant may clearly be issued whether or not a formal prosecution has been instituted. This holding completely disposes of the defendant's unique contention with regard to the invalidity of the

arrest warrant.

For some reason, however, Justice Compton then felt compelled to discuss the meaning of the words "initiation of a criminal proceeding." The court stated that the only method of instituting a criminal proceeding on a felony was to file an Indictment or an Information in the Superior Court, the court having original jurisdiction. The court also made the amazing statement that the only purpose for the complaint in Municipal Court is to provide a basis for issuing an arrest warrant. This apparently would mean that where the defendant was arrested without warrant and brought to Municipal Court, there is no need for a complaint. This, it seems to petitioners, is inconsistent with a number of statutory requirements which have previously been discussed, but also seems to conflict with the following language from the Opinion itself:

> "The requirement that the filing of an Information be preceded by a preliminary hearing before a magistrate and a commitment by the magistrate based on probable cause is a creature of statute (Pen. Code, § § 737, 738, 872) and is designed to satisfy the due process requirement of the Fourteenth Amendment to the United States Constitution by serving as a substitute for the control on prosecutorial power provided by the Fifth Amendment to the United States Constitution requiring all prosecutions for infamous crimes to proceed by way of Grand Jury Indictment."
>
> [105 C.A. 3d at 833-834]

In this language, the court seems to clearly acknowledge that both the Penal Code and the due process clause of the United States Constitution require that certain things precede the filing of an Information. A mandatory prerequisite is a preliminary hearing before a magistrate and a commitment by that magistrate. The court cites, among other sections, Penal Code §738, which we have previously pointed out requires a preliminary hearing which must itself be preceded by a "written complaint as provided elsewhere in this code." Penal Code §738 is cross referenced to Penal Code §806.

From all of this, petitioners strongly urge that the court in **People v. Case** was just plain wrong in urging that the "only" function of a complaint is to provide a basis for issuing an arrest warrant. Clearly it also provides the jurisdictional basis for **a magistrate to proceed to conduct a preliminary** hearing. In fact the court seems to acknowledge this as well:

> "The 'complaint,' as that term is used in Penal Code §813, is not a formal accusatory pleading filed in a Court with trial jurisdiction over the offense. Hence it does not institute a criminal proceeding. **It is instead simply the basis for conducting a hearing to determine if probable cause exists to hold the person for trial.** (Pen. Code, §806)" [emphasis added] [105 C.A.3d at 834]

A DEFENDANT IS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND HIS CONSTITUTIONAL GUARANTEE AGAINST UNREASONABLE SEARCHES AND SEIZURES WHEN HE IS COMPELLED TO FACE A FELONY PRELIMINARY HEARING IN WHICH THE COMPLAINT WAS NOT UNDER OATH.

In **Giordenello vs. U.S.**, 357 U.S. 480, 2 L.Ed.2d 1503, 78 S.Ct. 1245 (1958) the complaint in support of an arrest warrant simply stated that the petitioner concealed heroin with knowledge that it was illegally imported. The defendant was arrested pursuant to that arrest warrant and heroin was seized incidental to that arrest. In the Supreme Court the petitioners attacked the sufficiency of the complaint to issue the warrant.

The Supreme Court began its analysis by pointing out that the Fourth Amendment to the United States Constitution requires that no warrant shall issue "but upon probable cause supported by oath or affirmation." This provision was intended to require the issuing magistrate to be the person who independently determines probable cause, rather than to accept mere conclusions from the complainant.

> "When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed.

> The Complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

In **People vs. Sesslin**, 68 C.2d 418 (1968) the complaint which was the basis for the arrest warrant alleged on information and belief that the defendant wrote a bad check with the intent to defraud. The court dealt directly with Penal Code §806. A portion of that section provides that a complaint "may be verified on information and belief." It was argued that that language was unconstitutional, because of the decision in **Giordenello**, supra, which prevented complaints on information and belief. The California Supreme Court held, however, that the language in Penal Code §806 must be read to require that where the complaint is on information and belief, it must allege sufficient facts for the magistrate to conclude that probable cause supports the warrant.

The holding of the court was that an arrest warrant is invalid if based solely on a complainant's information and belief and if there are no underlying facts upon which a magistrate may independently determine probable cause. If these are not present, any arrest based on that complaint is invalid.

In the instant case, we have an analogous situation in which the complaint is not used to arrest but is used as a

basis for compelling the defendant to face felony charges. Where that complaint is insufficient for lack of an oath, the defendant is illegally before the magistrate. If an arrest based upon such a complaint is illegal, surely a preliminary examination based on such a complaint is in no better position.

The due process basis for these requirements have previously been alluded to in this petition, and are in fact re-emphasized in the above quotes from **People vs. Case**, supra.

Certain California Penal Code statutes are structured in the mandatory "**must**" and "**shall**" format, and as such leave no discretion to those courts, magistrates or prosecutors seeking to invoke them.

Penal Code § § 738 and 806 are so structured and thus disenables the municipal court from proceeding with a preliminary hearing and its consequences on binding a defendant over to trial unless they are complied with.

Neither section was adhered to in appellants-petitioners' case purportedly commenced in the Bellflower-Cerritos Municipal Court of Los Angeles County.

At all stages appellants raised this defect:

(a) Before and after preliminary hearing;

(b) P.C. 995 and non-statutory motions to dismiss;

(c) Writs of Prohibition, mandamus;

(d) Appeal to the Second Appellate District.

The California Court of Appeal disposed of this threshold issue of apparent first impression in California in a

mere **13 lines** in the written Opinion, final paragraph, p. 40, Appendix "A" of this Petition.

It is apparent that the leading case interpreting the mandatory "must" language of the California Penal Code sections, **People v. Elliott**, (1960) 54 C.2d 498, 6 Cal.Rptr. 753, 354 P.2d 255 forecloses denial of relief to appellants. Like the case at bar, **Elliott**, supra, dealt with fundamental and substantial rights of the accused at a California preliminary hearing.

People v. Elliott, supra, dealt with the following language of Penal Code §868:

> . . .the magistrate **must** also, upon request of the defendant, exclude from the examination every person except his clerk, court reporter and bailiff, the prosecutor and his counsel, the Attorney General, the District Attorney of the county, the defendant and his counsel and the officer having the defendant in custody. . ."

At **Elliott's** preliminary hearing, over objection of the defendant, the magistrate allowed in attendance a newspaper reporter.

Reversal of the conviction ensued. Like the case at bar, Defendant Elliott raised the defect at the commencement of the preliminary hearing on a P.C. 995 motion, on a Writ of Prohibition, at trial, and on appeal.

Only before the California Supreme Court was **Elliott** successful. (54 C.2d 498, 502)

Initially that court held that the "must" language of P.C §995 required reversal of the conviction, as **Elliott** was not legally committed by the magistrate, since the "must" language of P.C. §868 allows neither choice nor discretion on the part of the magistrate to allow non-authorized persons at a California preliminary hearing upon motion of the defendant.

Penal Code §738, provides, in part:

> "Before an Information is filed, there **must** be a preliminary examination of the case against the defendant and an order holding him to answer made under §872. The proceedings for a preliminary examination **must be commenced by written complaint as provided elsewhere in this code.**" [emphasis added]

Penal Code §806 provides:

The requirement of a complaint under oath is again repeated in Penal Code §859, which provides in part as follows:

> "When the defendant is charged with the commission of a public offense over which the Superior Court has original jurisdiction, by a written complaint subscribed **under oath** and on file in a Court within the county in which the public offense is triable, he or she shall, without unnecessary delay, be taken before a magistrate of the Court, in which such complaint is on file." [emphasis supplied]

It is to be noted that all of the critical sections provide

for the mandatory requirement "must", and therefore the court could **not** perform the series of steps ranging from holding of the preliminary hearing to binding over of the petitioners to trial in the Superior Court and ultimate conviction.

Each act was a nullity as is made plain in **Elliott**, supra. The California Supreme Court in **Elliott** held:

> "**There is no doubt that the trial court committed error in denying appellant's motion to set aside the information. The question is as to the effect of that error.**
>
> [1] **In the first place, as a result of that error, appellant was not 'legally' committed within the meaning of §995 of the Penal Code.** That section expressly provides that the court 'must' set aside an information if the defendant has not been legally 'committed'. The phrase 'legally committed', . . . refers to the examination of the case and the holding of the defendant to answer, as prescribed by title 3, chapter 7, of the Penal Code." (**Ex Parte Baker**, 88 Cal. 84, 85 P 996].)

If the Superior Court denies a Penal Code §995 motion, the resulting conviction will be reversed.

The California Supreme Court held:

> "[3] **It is also settled that, if the defendant has not been legally committed and if the trial court erroneously denies the motion to**

set the commitment aside and permits the action to proceed to judgment, the resulting conviction must be reversed. (Whitney v. Superior Court, 182 Cal. 114 [187 P. 12]; **People v. Howard**, 111 Cal. 655 [44 P. 342]; **People v. Napthaly**, supra, 105 Cal. 641.)

[4] The theory of these cases is that where the accused is not legally committed within the meaning of §995 of the Penal Code, the commitment is voidable. **Upon proper objection, the Superior Court has no jurisdiction to proceed. It is the same as if no preliminary examination at all had been held, and is analogous to the situation where no evidence to connect the accused with the crime is introduced at the preliminary examination. In such event, of course, the information must be quashed. (Greenberg v. Superior Court**, 19 Cal. 2d 319 [11 P. 2d 713].) The holding to the contrary in **People v. McCalla**, 63 Cal. App. 783 [220 P. 436], is disapproved."

The preliminary hearing in California **must be conducted** according to the dictates of the Penal Code, as the California Supreme Court noted:

"[6] **The preliminary examination must be held basically in accordance with the procedures established by law, and if the magistrate disregards substantial rights guaranteed to the defendant the resulting commitment is unlawful."**

The mandatory "must" language leaves no choice in the Municipal Court; it cannot proceed; in interpreting Penal Code §868, the California Supreme Court said:

> "[7] The right afforded to a defendant by §868 of the Penal Code, to require that all unauthorized persons be excluded from the courtroom during the preliminary examination, **is a substantial safeguard which cannot be disregarded by the magistrate. It contrasts sharply with §867, which gives the magistrate discretion to exclude and/or separate witnesses.** §868 **gives the defendant an absolute right to protect himself against the presence of unauthorized persons at his preliminary examination."**

Where, as in the case at bar, these petitioners raised this substantial and fundamental and mandatory code section defect at all stages, it is a valid appellate contention.

Elliott held:

> "[15] **It is well established that an accused cannot ignore errors in the commitment procedure until after conviction and then attempt to raise such errors for the first time on appeal. But appellant does not fall within this rule. She raised her objection to the magistrate's erroneous conduct at every stage in the proceedings and by every means available to her. She first attempted to**

invoke the protection of §868 at the commencement of the preliminary examination. She repeatedly objected when the magistrate erroneously permitted the newspaper reporter to return to the courtroom. She moved in a timely manner to set aside the information in conformity with §995 of the Penal Code. Then she sought a writ of prohibition, and, when this was denied, she further objected at the commencement of her trial. Under these circumstances, appellant is entitled to urge the illegality of her commitment as a ground for reversal on appeal. (Whitney v. Superior Court, supra, 182 Cal. 114; **People v. Howard**, supra, 111 Cal. 655; **People v. Napthaly**, supra, 105 Cal. 641.) **If this were not the rule then an erroneous denial of a motion to set aside the information would cure a substantial error in the commitment procedure.**

[16] **Article VI, Section 4½, of the Constitution, cannot operate so as to save this conviction. When a defendant has been denied a fair trial prejudice must be presumed.** [17] Nor can a fair trial in the Superior Court cure the errors of the committing magistrate and of the Superior Court judge in permitting the trial to take place. **Before an accused can be required to defend himself he must be committed in accordance with law. (People v. Bomar,**

73 Cal. App. 372, 378 [238 P. 758].)

It therefore is the law that these petitioners "must be committed in accordance with law" before they need to even consider a defense.

So-called harmless error rules cannot save the case; **Elliott** provides:

> "[18] The court said: **'When a defendant has been denied any essential element of a fair trial or due process, even the broad saving provisions of §4½ of Article VI of our state Constitution cannot remedy the vice and the judgment cannot stand.**[citing four cases.]

Finally, the California Supreme Court once again noted the consequence of a **mandatory statute** that has, admittedly, been violated; at 54 C. 2d 498, 507, that Court ruled:

> "[20] It must be remembered that here we have a mandatory statute that admittedly **has been violated. Unless the error can be reached on appeal from the judgment it cannot be reached at all even though the Superior Court erroneously denied a motion under §995 of the Penal Code and the appellate court erroneously denied the application for a writ. To agree with respondent would, in effect, be to write the statute off the books.**

The judgment is reversed, and the trial court is directed to set aside the information."

Elliott was a unanimous decision of the California Supreme Court.

The rule enacted in **Elliott**, supra was reembraced by that Honorable Court in **In re LaCroix**, 12 Cal. 3d 146, 154 fn. 5, 115 Cal. Rptr. 344, 524 P. 2d 816.

In **People v. Chiko Wong**, 18 Cal. 3d 698, 135 Cal. Rptr. 392, 557 P. 2d 976, the Court distinguished adult from juvenile court challenges to commitment to Superior Court, again asserting that a "timely and proper attack" in the Superior Court can set aside a preliminary hearing under a Penal Code §995 motion, while the same procedure may be wanting in the juvenile arena. **People v. Elliott**, supra, was again cited as the leading authority.

See also that Court's holding in **People v. Superior Court** (Greer), 19 Cal. 3d 255, 263, fn. 5, 137 Cal. Rptr. 476, 561 P. 2d 1164.

And of course, actual prejudice need not be demonstrated; reversal is automatic; **People v. Ruiz** (1968), 262 C.A.2d 216, 227-28, 69 Cal. Rptr. 473, reaffirming the **Elliott** principle. In further support that the provisions of the Penal Code are to be strictly construed, see **Guerin v. Superior Court**, 269 C.A.2d 180, 183, 75 Cal.Rptr. 923.

The **Elliott** rationale was applied in an earlier case by the California Supreme Court (**Greenberg v. Superior Court**, 19 Cal. 2d 319) allowing attack on improperly conducted Grand Jury proceedings.

A Penal Code §995 motion is the proper basis to challenge the defect in commitment; **Miller v. Hamm**, (1970) 9 C.A. 3d 860, 869, 88 Cal. Rptr. 538; cf., however, **People v. Williams**, 10 C.A. 745, 749, 89 Cal. Rptr. 364, asserting that bind over defects may be considered on appeal if addressed in a motion for a new trial.

Irrespective of this, petitioners QUICK and GORDON asserted the defect in the early stages of this case both in Municipal and Superior Courts by writs of prohibition, and on appeal. Cf. **People v. Malich** (1971) 15 C.A. 3d 253, 263-266, which holds automatic reversal if the petitioner has not been legally committed and the cause proceeds to trial.

The mandatory language of the Penal Code Sections here involved (P.C. 738, 806) was further explicated in **Serrato v. Superior Court**, 76 Cal. App. 3d 459, 463 ff., 142 Cal. Rptr. 882 where the mandatory language of P.C. §859b was construed to give the defendant an absolute right to a preliminary hearing within ten days if he is in custody, P.C. 859b provides:

> ". . . Unless the defendant waives the right, the defendant, if he is in custody **shall** have the right to preliminary examination within ten court days of the date he is arraigned or pleads, whichever occurs later . . . "

The Court of Appeals issued a writ of prohibition to prohibit trial in view of the improper commitment to Superior Court. The statute in question was a mandatory one which had to be strictly adhered to.

The instant issue raises an issue not known to have been resolved by any published opinion of a California Appellate Court. It cannot be brushed aside in view of the mandatory language of P.C. §§758 and 806.

Certiorari is prayed for and the reasons for granting it are:

1. The Trial Court and the California Court of Appeals refuse to recognize that the mandatory "must" language of P.C. §§738 and 806 and related statutes absolutely forbid the commence ment of a preliminary hearing, and thus all subsequent events in the criminal process, without the properly sworn complaint being filed; that was not done here, and everything thereafter was a nullity.
2. This Honorable Court should grant certiorari to explicate that no state criminal prosecution can be commenced absent compliance with the requirements for initiating criminal procedure in California, or in whatever state is involved.

CONCLUSION

This Honorable Court should grant certiorari to emphasize that a state criminal defendant cannot within the provisions of either state or federally-protected rights, be charged with and tried for a state crime unless jurisdiction is properly conferred on the state court; that never

having occurred here, the convictions of these petitioners must and should be reversed.

Respectfully submitted,

Roger S. Hanson
Attorney for the Petitioners

STATEMENT OF RELATED CASES

Pursuant to Rules of the United States Supreme Court, petitioners and their counsel know of no cases that are related to this case and petition for certiorari which are now pending before this court.

Dated May 25, 1985

Roger S. Hanson
Attorney for Petitioner
Member of the Bar
Supreme Court of the U. S.

Appendix "A"

NOT TO BE PUBLISHED
COURT OF APPEAL-SECOND DIST.
F I L E D
JAN 23 1985
CLAY ROBBINS, JR. Clerk

Deputy Clerk

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

COLLIN LEE QUICK and BARBARA GORDON,

Defendants and Appellants.

2D CRIM. Nos. B001968 and B002366

Collin Lee Quick and Barbara Gordon appeal from judgments entered after a nonjury trial convicting them each of one count of conspiracy to sell cocaine, one count of sale of cocaine, and one count of possession for sale of cocaine (Pen. Code, § 182, subd. (1), Health & Saf. Code, § § 11351, 11352.)[1] They contend: "[I.] The search and seizure and subsequent entry of any closed and opaque

bag or container or envelope taken from the blue Mercedes-Benz was illegal and in violation of the 4th and 14th Amendments to the U.S. Constitution, the equivalent area of the California Constitution, and appellants [sic] reasonable expectation of privacy. [II.] A defendant is not legally committed within the meaning of Penal Code §995 when the complaint in municipal court is not under oath as required by Penal Code §806. [III.] A superior court is without jurisdiction to proceed on an information which is based upon a commitment by a magistrate who was without jurisdiction, because the complaint was not under oath as required by Penal Code §806."

Viewing the evidence at the suppression hearing in the light most favorable to the challenged order in accordance with the usual rule governing appellate review (**People v. Leyba** [1981] 29 Cal.3d 591, 596-597), the record establishes that on July 20, 1981, Special Agent Michael Rockey, of the California Department of Justice Bureau of Narcotic Enforcement, spoke to Ms. Gordon and another party, Mr. Perkins, and thereafter with Mr. Quick who agreed to sell two kilograms of cocaine for $128,000. After a telephone conversation later that afternoon between Agent Rockey and Ms. Gordon, and a subsequent meeting between them, Mr. Perkins and Mr. Quick, further details as to the sale were discussed. Mr. Quick had divided the cocaine into three amounts and wanted to deliver half a kilogram of cocaine, apparently followed soon thereafter by a second half kilogram, and then an additional kilogram.

At approximately 11 p.m. that evening Agent Rockey, Mr. Quick, Ms. Gordon and Mr. Perkins met at the parking lot of a nearby restaurant. Mr. Quick obtained a brown shopping bag from his trunk and gave it to Mr. Perkins. Mr. Perkins then had Agent Rockey joing him inside his car, and gave him the shopping bag which contained half a kilogram of cocaine inside a plastic bag. During the transaction, Agent Rockey gave a prearranged arrest signal to assisting officers who converged on the scene. Mr. Quick fled on foot but was apprehended and arrested near the parking lot. Ms. Gordon and Mr. Perkins were arrested at the cars. Agent Rockey removed from Mr. Perkins' car the bag containing half a kilogram of cocaine which had been given to Agent Rockey and came from Mr. Quick's trunk. Other officers then searched Mr. Quick's car. The car door was open, and a cursory look under the front passenger seat revealed a clear plastic bag containing cocaine and a small, open brown paper bag which contained another plastic bag of cocaine. In the trunk was an unsealed packing envelope containing a clear plastic bag of cocaine.

Contrary to appellants' contention, the warrantless search of Mr. Quick's car and the seizure and search of containers of cocaine found in the vehicle were lawful. Police officers are not required to obtain a warrant to validly search containers discovered in the course of a search justified as a search incident to arrest or in an automobile in which an illicit exchange of drugs has just occurred. (See **United States v. Ross** (1982) 456 U.S. 798; **United**

States v. **Robinson** (1973) 414 U.S. 218, 235; **People v. Superior Court (Valdez)** (1983) 35 Cal.3d 11, 15-16; People v. **Chavers** (1933) 33 Cal.3d 462, 466-471; Wimberly **v. Superior Court** (1976) 16 Cal.3d 557, 564.) When, as here, there is probable cause to believe that contraband is present in a vehicle, an officer may conduct an immediate warrantless "search of the vehicle that is as thorough as a magistrate could authorize in a warrant..." (**United States v. Ross, supra**, at p. 800; see also **People v. Superior Court (Valdez), supra**, at pp. 15-16.)[2]

Appellants' final contentions are equally without merit. Appellants urge that because the complaint filed in the municipal court was not subscribed under oath (see Pen. Code §806), the magistrate had no jurisdiction to conduct a preliminary hearing and bind appellants over for trial. According to appellants' arguments, the superior court was deprived of jurisdiction because of this "defect." Any technical defect concerning the execution of the complaint filed in municipal court does not affect jurisdiction in the fundamental sense in terms of the legal power to try the case. (See **People v. Pompa-Ortiz** (1980) 27 Cal.3d 519, 529; cf. **People v. Case** (1980) 105 Cal.App.3d 826, 833-834.)

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The judgments are affirmed.
NOT TO BE PUBLISHED.

ROTH, P.J.

We concur:

_____, J.
BEACH

_____, J.
GATES

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1. Appellants' trial was submitted on the transcript of the preliminary hearing.

2. We also note that appellants' motion to suppress the cocaine in Mr. Quick's car did not address itself to the half a kilogram of cocaine which Mr. Quick had given to Mr. Perkins to give to Agent Rockey. Apart from the cocaine in Mr. Quick's car, the half a kilogram of cocaine given to Agent Rockey as a part of the undercover transaction and the abundant evidence of the conspiracy to sell cocaine would render harmless any conceivable error in admitting evidence of the other cocaine at trial. (Cf. **People v. Miller** (1983) 33 Cal.3d 545, 550-556.)

Appendix "B"

ORDER DENYING HEARING

After Judgment By the Court of Appeal

2nd District, Division 2, No. B001968/B002366

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

V.

COLLIN LEE QUICK and BARBARA GORDON

Supreme Court
F I L E D
APR -- 3 1985
Laurence P. Gill, Clerk

_____
Deputy

Appellants' petition for hearing DENIED.

BIRD

_____
Chief Justice

PROOF OF SERVICE

STATE OF CALIFORNIA)

) ss:

COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4075 Agate Street, Riverside, California 92509.

On June 2, 1985 I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in each of three (3) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

Attorney General of California
Attention: Gary Schons, Esq.
110 West "A" Street
San Diego, California 92101

Clerk of the Superior Court
12720 Norwalk Blvd.
Norwalk, CA
Attention: Hon. Thomas Nuss
Judge of the Superior Court

Clerk, Court of Appeal
2nd Appellate District
3580 Wilshire Blvd., 3rd Floor
Los Angeles, CA 90010

and also upon the California Supreme Court by placing seven (7) true copies in a sealed envelope with postage

thereon fully prepaid in the United States mail at San Bernardino, California, addressed to:

California Supreme Court
3580 Wilshire Blvd., Room 213
Los Angeles, CA 90010

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on June 2, 1985, at Riverside, California.

_____

JACK GALLAGHER